

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROGELIO SARABIA</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONAL BEEF PACKING COMPANY</b>	)	Docket No. 168,397
Respondent	)	
AND	)	
	)	
<b>LUMBERMEN'S UNDERWRITING</b>	)	
Insurance Carrier	)	

---

<b>ROGELIO SARABIA</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONAL BEEF PACKING COMPANY</b>	)	Docket No. 202,940
Respondent	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS</b>	)	
Insurance Carrier	)	
	)	
AND	)	
	)	
<b>KANSAS WORKERS</b>	)	
<b>COMPENSATION FUND</b>	)	

**ORDER**

Claimant appeals Administrative Law Judge (ALJ) Pamela J. Fuller's Decision dated February 16, 2001. The Appeals Board (Board) heard oral argument on August 29, 2001.

**APPEARANCES**

Lawrence M. Gurney of Wichita, Kansas, appeared for the claimant. Kerry E. McQueen of Liberal, Kansas, appeared for respondent and its insurance carriers. Randall D. Grisell of Garden City, Kansas, appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Board considered the record set forth in the August 23, 1993 Decision in Docket No. 168,397 and in the February 16, 2001 Decision in Docket Nos. 168,397 and 202,940 and adopts the stipulations listed in the February 16, 2001 Decision.

**ISSUES**

1. What is the nature and extent of claimant's disability?
2. Did the claimant meet with a new and separate personal injury by accident arising out of and in the course of his employment after the accident covered by the August 1993 Award entered in Docket No. 168,397 or is his increased disability, if any, the natural and probable consequence of that original injury?
3. If claimant suffered a new accident, then what is the date of accident in Docket No. 202,940?
4. Is the Kansas Workers Compensation Fund liable for the payment of compensation in Docket No. 202,940?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein and having considered the parties' briefs and oral arguments, the Board finds that the Decision entered by the ALJ should be affirmed. The Board adopts the findings, conclusions and orders of the ALJ as its own as if specifically set forth herein. Additionally, the Board makes the following findings of fact and conclusions of law:

Claimant is a long-term employee of National Beef Packing Company. In 1991, he developed problems in his left shoulder and neck as the result of his job duties as a second legger wherein he used his arms and hands in a repetitive and forceful way to skin the hide off cows' legs. On August 23, 1993, Administrative Law Judge Thomas F. Richardson awarded claimant compensation based on a 5% functional impairment to the body as a whole in Docket No. 168,397, apparently based on a split between the functional impairment ratings assigned to claimant's condition by Dr. Ernest Schlachter, a general practitioner, and Dr. C. Reiff Brown, a board certified orthopedic surgeon.

When Dr. Schlachter examined claimant in November 1992, claimant described a "pressure feeling in the back of his neck," as well as pain in his chest and neck when pushing or pulling objects or performing overhead work. Moreover, he reported increased neck pain if he kept his neck in one position for long periods of time. Based on claimant's subjective complaints and his examination of claimant's neck and left shoulder, Dr. Schlachter opined claimant suffered from a chronic cervical sprain (7%), resolved rotator cuff tendinitis of the left shoulder (1%), and a costal chondral separation (3%). These conditions, he felt, warranted an 8% whole body functional impairment rating and limited claimant's ability to lift over fifty pounds or perform overhead work.

Dr. Brown first evaluated claimant in March 1993. At the time, claimant reported intermittent discomfort in the front and upper aspect of the left shoulder when using his left arm at work. He also reported tightness in the sides of his neck during work activities and after sitting in one position for a long period of time. Based on claimant's subjective complaints, his examination of claimant's neck and left shoulder, and his review of a negative CAT scan report, Dr. Brown opined claimant suffered from a chronic cervical strain and left shoulder tendinitis. Unlike Dr. Schlachter, however, he determined that claimant's condition warranted only a 2% functional impairment rating, a rating limited to the shoulder. Dr. Brown further recommended that claimant not repeatedly use his arm above shoulder level.

Claimant returned to work for respondent after his November 1991 injury. In his new position, claimant held decapitated cow skulls with his left hand and used his right hand to wash the inside with a highly pressurized hose. Claimant testified at the Regular Hearing in Docket No. 168,397 that this position was within Dr. Schlachter's restrictions. He also informed Dr. Brown in March 1993 that he experienced a decided reduction in symptoms in that position. In fact, he informed Dr. Pedro Murati, a board certified physiatrist and independent medical examiner, in August 1994, that he was very happy with his job and if respondent retained him in this position, his problems would decrease.

Nevertheless, after the 1993 Award in Docket No. 168,397, claimant filed an application for review and modification, alleging increased disability beginning in March 1994 and continuing each and every working day thereafter. In Docket No. 202,940, he filed a new application for compensation on or about July 12, 1995, alleging injuries suffered as the result of a series of industrial accidents beginning March 1994 and continuing each and every working day thereafter.

At the Regular Hearing by Deposition in claimant's consolidated cases, he testified that his new position made his neck and shoulder condition progressively worse day by day. According to claimant, his current condition was the result of a new injury because his first injury predominantly affected his neck, and the second injury predominantly affected the left shoulder. Both his neck and shoulder conditions, he testified, were much worse than at the time of the 1993 Award.

Three physicians testified in claimant's consolidated cases. Two of the physicians, Dr. Murati and Dr. Brown, examined claimant either close to or during the relevant time frames. As noted above, Dr. Brown examined claimant in March 1993. He also examined him in March 1998. Dr. Murati was claimant's post-Award treating physician from June to August 1994 primarily for neck pain, and he also examined claimant in April 1999. Both Dr. Murati and Dr. Brown opined that claimant sustained additional impairment subsequent to the 1993 Award. To the contrary, Dr. Blake C. Veenis, who is board certified in physical medicine and rehabilitation, determined that claimant did not suffer additional impairment after the 1993 Award.

Dr. Brown testified on respondent's behalf after examining claimant and reviewing certain records in claimant's file. Dr. Brown initially testified that he did not find any objective evidence that claimant suffered from increased disability since 1993. Furthermore, he testified that his 1992 opinion regarding functional impairment and work restrictions remained unchanged. However, Dr. Brown admitted that the results of a MRI might change his opinion. And when he actually received a copy of a June 20, 1994 MRI scan revealing a mildly bulging cervical disc, he did in fact change his opinion. According to Dr. Brown, using the Fourth Edition of the *AMA Guides*, claimant suffered from a 5% whole body impairment attributable to degenerative disc disease, apparently in addition to the 2% functional impairment rating assigned claimant's shoulder condition in 1993. As for causation, Dr. Brown opined that claimant's 5% functional impairment rating resulted from claimant's work activities aggravating his pre-existing degenerative problem. He then stated ambiguously, "The Fourth Edition would place the entire 5% the result of that incident."

Dr. Murati testified on claimant's behalf. He treated claimant briefly for a chronic cervical musculoskeletal strain from June 1994 to August 1994. In August 1994, Dr. Murati assigned a 2% functional impairment rating to claimant's neck in accordance with the Third Edition of the *AMA Guides*. During his testimony, he stated that when he examined claimant again in April 1999, claimant's neck condition had worsened, now resulting in a 7% functional impairment under the Fourth Edition of the *AMA Guides*. He also *initially* opined claimant suffered from new conditions in 1999 resulting in additional impairment, including a left shoulder strain with loss of range of motion (2%) and probable carpal tunnel syndrome (10%), for a combined 14% whole body impairment rating. Nonetheless, when respondent pointed out claimant's prior shoulder problems, Dr. Murati testified that claimant's additional impairment to the neck and shoulder was related to claimant's continuing labors with respondent and represented a "progression throughout his work."

Dr. Veenis also testified after performing a court-ordered independent medical examination (IME). Unlike Dr. Murati and Dr. Brown, Dr. Veenis opined claimant's current neck pain and mild left shoulder rotator cuff tendinitis were directly related to his initial injury in 1991. He further opined that, according to the Third Edition (Revised) of the *AMA Guides*, the initial injury caused a 2% functional impairment to the neck, a 3% functional impairment to the left shoulder, and an overall 4% functional impairment to the body as a

whole. Dr. Veenis opined that all of claimant's current permanent impairment was related to the initial injury in 1991 and existed since that time.

Based on this evidence, the ALJ held that claimant failed to meet his burden of proving that he met with personal injury by accident arising out of and in the course of employment in Docket No. 202,940. In addition, the ALJ held that claimant failed to meet his burden of proving any additional impairment in Docket No. 168,397. The ALJ reasoned:

"This is based on Dr. Veenis's opinion which this Court finds to be the most reliable. Dr. Veenis found the Claimant to suffer a 4% to the body as a whole impairment. The Claimant was previously compensated for a 5% permanent partial impairment to the body as a whole in Docket No. 168,397. It appears the Claimant was compensated for his left upper extremity and cervical injury by a split of Dr. Schlacter's 8% whole person rating and Dr. Brown's 2% whole person impairment."

On appeal, claimant argues that the ALJ erred by adopting Dr. Veenis's medical opinion. Claimant reasons that Dr. Brown and Dr. Murati were in far better positions to evaluate claimant's condition before and after the 1993 Award because they both had an opportunity to see claimant contemporaneously with his first injury and evaluate his subsequent problems. Additionally, claimant argues that the ALJ attached improper significance to Dr. Veenis's opinion simply because it resulted from a court-ordered independent medical examination.

The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> In Docket No. 168,397, this burden includes proving by a preponderance of the evidence a changed condition as the natural and probable consequence of the original injury, rendering the 1993 Award inadequate.<sup>2</sup> On the other hand, in Docket No. 202,940, this burden includes proving by a preponderance of the evidence that claimant's work activities aggravated his preexisting condition and caused increased disability.<sup>3</sup>

The Board adopts the ALJ's analysis of the evidence and the opinion of Dr. Veenis and finds that claimant has not proved by a preponderance of the credible evidence that he sustained additional impairment as a natural and probable consequence of his 1991

---

<sup>1</sup> K.S.A. 44-501(a) .

<sup>2</sup> See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967); *Davis v. Haren & Laughlin Construction Co.*, 184 Kan. 820, 339 P.2d 41 (1959).

<sup>3</sup> See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 379, 573 P.2d 1036 (1978).

injury in Docket No. 168,397. The Board further finds that claimant has not proved by a preponderance of the credible evidence that he sustained a new injury in Docket No. 202,940 beginning in March 1994 and continuing each and every working day thereafter.

In March 1993 and August 1994, claimant reported to two physicians that his new position with respondent actually relieved the symptoms associated with the 1991 injury. Although he vaguely described his neck and shoulder conditions as worse at the Regular Hearing by Deposition in June 2000, throughout the consolidated proceedings he also variously described similar pain and problems at the same locations and of the same nature as those he experienced before the 1993 Award in connection with the November 1991 injury. In addition, the majority of medical evidence of record preponderates against a finding of increased disability associated with either the natural progression of a neck or left shoulder condition or a new injury to either region.

While the extent of impairment varied slightly between the two opinions expressed therein, Dr. Brown's March 1998 report and Dr. Veenis's August 1999 report reflect strikingly similar objective findings, findings that are consistent with claimant's pervasive subjective complaints and findings noted in Dr. Schlachter's November 1992 report. Moreover, Dr. Veenis's opinion and Dr. Brown's *initial* opinion regarding the nature of claimant's condition, as well as increased disability are consistent. Both physicians opined that claimant suffered from neck pain associated with a cervical strain and left shoulder tendinitis, and both physicians indicated that claimant's entire functional impairment was related to the November 1991 injury. In other words, both physicians were of the opinion that claimant did not suffer from additional disability after the 1993 Award.

While Dr. Brown ultimately altered his opinion regarding claimant's neck condition in a supplemental report, his new opinion was based on the results of an MRI performed in June 1994. His supplemental opinion can best be described as vague and ambiguous since it is impossible to discern whether Dr. Brown changed the initial functional impairment rating assigned in 1993 or offered support for claimant's theory regarding a worsening or aggravation of the cervical condition since 1994.

To the extent Dr. Brown's supplemental opinion supports increased disability based entirely on the June 1994 MRI report, the Board finds his opinion is simply not credible. First, although Dr. Brown did not rate claimant's cervical condition in March 1993, Dr. Schlachter did in November 1992, and the August 1993 Award included compensation for functional impairment to that area. In the same vein, although Dr. Brown did not rate claimant's cervical condition in March 1993, the opinion expressed in Dr. Brown's supplemental report is in fact consistent with Dr. Schlachter's opinion in November 1992 regarding the nature and extent of claimant's disability. And while the evidence of record before the 1993 Award did not include evidence of a mildly bulging disc, Dr. Brown's supplemental report completely disregards claimant's statements to Dr. Brown in March 1993 and to Dr. Murati in August 1994 regarding the favorable impact his job had on his neck and shoulder conditions. Similarly, Dr. Brown's supplemental report disregards claimant's testimony at the Regular Hearing by Deposition to the effect that his "first injury"

predominantly involved his neck whereas his "second injury" predominantly involved his shoulder. When taken together, claimant's testimony, the June 1994 MRI report, Dr. Schlachter's November 1992 opinion, and Dr. Brown's supplemental opinion indicate that the 5% functional impairment rating reflected in Dr. Brown's supplemental report preexisted his claim in Docket No. 202,940 and the 1993 Award. As a result, the Board finds that Dr. Brown's supplemental report does not support that claimant sustained a new injury after the 1993 Award or that claimant is entitled to modification of the 1993 Award.

Finally, Dr. Murati's opinion is dubious as to causation, on the one hand supporting the theory of a new injury, and on the other supporting the theory that claimant's increased disability was simply the natural and probable consequence of the November 1991 injury. What is more, Dr. Murati's impairment rating is not credible in light of claimant's pervasive complaints, the extraordinary variance between Dr. Murati's 1994 and 1998 opinions, and the variance between his opinion and the other medical opinions of record. In particular, Dr. Murati is the only physician of record that noted symptoms of carpal tunnel syndrome, a condition for which Dr. Murati assigned a 10% rating. In the end then, considering the entire record, the Board finds and concludes that Dr. Veenis's opinion concerning the nature and extent of claimant's disability is most consistent with claimant's long-term subjective complaints and objective manifestations, and therefore is more accurate and persuasive than Dr. Murati's opinion or Dr. Brown's supplemental opinion. That being the case, the Board concludes that claimant failed to prove that he sustained increased disability since the 1993 Award, and all other issues are moot.

### **AWARD**

**WHEREFORE**, it is the Board's finding, decision and order that the February 16, 2001 Decision of Administrative Law Judge Pamela J. Fuller is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2002.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c:     Lawrence M. Gurney, Attorney for Claimant  
       Kerry E. McQueen, Attorney for Respondent and Insurance Carriers  
       Randal D. Griswell, Attorney for Fund  
       Pamela J. Fuller, Administrative Law Judge  
       Director, Division of Workers Compensation